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January 7, 2002

FILE NO. 026805-0001

VIA FEDEX

CALIFORNIA ENERGY COMMISSION
DOCKET UNIT, MS-4
Attn: Docket No. 97-AFC-1C (C1)
1516 Ninth Street
Sacramento, California 95814-5512

Re: Complaint of Gary Ledford on HDPP Water Issues
CEC Docket No. 97-AFC-1C (C1)

Dear Sir/ Madam:

Pursuant to California Energy Commission Siting Regulation §1209(c) and §1209.5, enclosed herewith for filing please find an original and twelve (12) copies of HDPP's Answer to Complaint and Exhibits in Support of HDPP's Answer to Complaint.

Please note that the enclosed Answer to Complaint was filed today via electronic transfer (e-mail) to your attention.

Very truly yours,



Paul E. Kihm
Senior Paralegal

Enclosures

cc: Michael J. Carroll, Esq. (w/ encls.)
Eric M. Katz, Esq. (w/o encls.)

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6
7

8 **CALIFORNIA ENERGY COMMISSION**
9

10
11 In the Matter Of:

97-AFC-1-1C (C1)

12 Complainant Gary Ledford's Complaint To
Compel Compliance Of The California
13 Energy Commission To Enforce Conditions
of Certification In Final Order For 97-AFC-1
14

ANSWER TO COMPLAINT

Cal. Code Regs. tit. 20, § 1233

I.

INTRODUCTION

The High Desert Power Project ("Project") was the subject of two years of environmental review and public hearings by the California Energy Commission, and numerous other state and federal agencies. Mr. Gary Ledford, a local real estate developer, actively participated in that review process as an intervenor. Throughout the process, Mr. Ledford raised many of the same issues raised in the Complaint. After the lengthy review process, and consideration of thousands of pages of documentary evidence, the Commission approved the Project. Unsatisfied with the Commission's decision, Mr. Ledford unsuccessfully petitioned the Commission to reconsider its decision. Still unsatisfied, Mr. Ledford sought review of the Commission's decision in the California Supreme Court. The Court summarily denied review of the Commission's approval of the Project in August 2000. Again apparently unsatisfied with the Supreme Court's refusal to accept his position, Mr. Ledford now seeks the Commission's review of many of the same issues under the guise of arguing that High Desert Power Project, LLC ("HDPP") is not complying with the Project's conditions of certification. Just as the Commission and the Supreme Court previously determined that Mr. Ledford's specious claims have no merit, so too should the Commission determine that the allegations in the Complaint are unsupportable.

II.

STATEMENT OF FACTS

The Project is a 720-megawatt natural gas fired electrical power plant located at a site on the former George Air Force Base in the City of Victorville. Commission Decision, at 1.¹ An application for certification of the Project was submitted to the Commission on June 30, 1997. Id. at 5. On December 3, 1997, the Commission accepted the application as complete. Id. Commission staff held the first of many public workshops on December 30, 1997. Id. at 6. An

¹ All references herein to the "Commission Decision" are to the Commission Decision, Application for Certification for the High Desert Power Project, High Desert Power Project, LLC, Docket No. 97-AFC-1, May 2000.

1 informational hearing and site visit was held on January 15, 1998. Id. Over the course of the
2 next several months, numerous public workshops were held to assess the Project. Id. A second
3 informational hearing was conducted on July 1, 1998. Id. In January of 1999, after one and a
4 half years of review, the Commission staff issued its assessment of the Project. Id. at 7
5 Evidentiary hearings on the Project commenced in September of 1999 and extended over five
6 days. Id. The Committee issued its proposed decision on the Project on December 15, 1999. Id.
7 A public hearing on the proposed decision was held on January 27, 2000. Id. A sixth public
8 evidentiary hearing was held on February 18, 2000, and a revised proposed decision was issued
9 by the Committee on March 31, 2000. Id. The Commission adopted the revised proposed
10 decision on May 3, 2000.

11 The Commission Decision specifically addressed many of the issues raised in the
12 Complaint. Mr. Ledford himself concedes that “[t]he WATER issue was the most highly
13 contested area in these proceedings.” *See* Motion to Show Cause And Compel Compliance With
14 Conditions, Sept. 28, 2001, at 5. Even a cursory review of the record reveals that each of these
15 areas was exhaustively analyzed. As stated by Mr. Steve Larson, Executive Director of the
16 Commission, in a September 10, 2001 letter to Mr. Harold Singer, Executive Officer of the
17 California Regional Water Quality Control Board, Lahontan Region (Exhibit A²): “The nearly
18 three-year review process that resulted in the certification of the High Desert Power Project was
19 one of the most exhaustive conducted by the Energy Commission. Soil and Water Resources
20 received intensive scrutiny during our HDPP review process. All aspects of the water injection
21 and supply system were scrutinized in detail, and the result was expressed in the Soil and Water
22 Resources Conditions of Certification for the project.”

23 Throughout these proceedings, Mr. Ledford was an active participant. As an
24 intervenor, Mr. Ledford presented extensive testimony himself, and called several other
25 witnesses in an attempt to support his position. Mr. Ledford also conducted extensive cross-
26

27 ² Documents identified as Exhibits A – W are bound separately entitled “Exhibits In Support
28 of HDPP’s Answer To Complaint.”

1 examination of HDPP's witnesses and various government agency witnesses. Mr. Ledford's
2 presentation of evidence and cross-examination of witnesses comprise 392 pages in the hearing
3 transcripts. Of the 176 exhibits sponsored by all of the parties during the evidentiary hearings,
4 53 of them were sponsored by Mr. Ledford. Documents filed by Mr. Ledford and posted on the
5 Commission's web site comprise another 487 pages. A sampling of the motions and appeals
6 filed by Mr. Ledford in this matter follows:

- 7 • July 14, 1999 - "Motion for Preparation of Environmental Impact Report."
8 (Denied by Commission).
- 9 • January 31, 2000 - "Motion To Reopen Evidentiary Record And Hold
10 Additional Evidentiary Hearing For Limited Purpose." (Denied by Commission).
- 11 • February 17, 2000 - "Motion To Exclude Proffered Evidence." (Denied by
12 Commission).
- 13 • March 13, 2000 - "Motion to Strike to Purge Docket to Reject the Brief of
14 Victor Valley Water District." (Denied by Commission).
- 15 • May 1, 2000 - "Motion For Stay Of Site Certification Proceedings." (Denied
16 by Commission).
- 17 • May 1, 2000 - "Motion of Gary A. Ledford To Set Aside The Presiding
18 Member's Proposed Decision (RPMPD) And Reopen The Record To Correct Procedural Errors
19 And Conform The Evidentiary Record To The Facts." (Denied by Commission).
- 20 • May 1, 2000 - "Request Of Gary A. Ledford – Public Intervenor To Make Oral
21 Argument To Full Commission On The Revised [sic] Presiding Member's Proposed Decision
22 For The High Desert Power Project." (Denied by Commission).
- 23 • June 2, 2000 - "Petition for Reconsideration of the Decision to Certify the High
24 Desert Power Project." (Denied by Commission).
- 25 • July 12, 2000 – "Direct Writ of Review" filed in the Supreme Court of
26 California. (Denied by California Supreme Court, August 2000).
- 27 • September 28, 2001 - "Motion to Show Cause And Compel Compliance With
28 Conditions." (Dismissed by Commission).

1 • October 11, 2001 - "Request for Investigation To Determine Whether
2 Certification Was Granted Based On Applicant's Fraud; Perjured Testimony; Deceit; Or Bad
3 Faith." (Dismissed by Commission).

4 And Mr. Ledford has not limited his vexatious tactics to the Commission's
5 proceedings. For example, on September 6, 2001, Mr. Ledford filed the following with the
6 California Regional Water Quality Control Board, Lahontan Region: i) "Protest – Proposed
7 Waiver"; ii) "Motion To Continue Hearing"; iii) "Motion To Conduct Full CEQA Analysis And
8 Cumulative & Growth Inducing Impacts"; and iv) "Request to Take Judicial Notice of Related
9 Proceedings." Almost all of Mr. Ledford's filings raise the same issues that are raised in the
10 Complaint. To say that Mr. Ledford has "had his day in court" is an understatement of
11 monumental proportions.

12 Construction of the Project commenced in May 2001. *See* Declaration of Andy
13 Welch, Jan. 7, 2002 ("Welch Decl.") (Exhibit B), ¶ 2. The Project is being constructed
14 according to the designs and specifications reviewed and approved by the Commission. *Id.*
15 HDPP will begin its groundwater recharge program in September 2002, approximately nine
16 months prior to the expected commencement of commercial operation in the Spring of 2003.
17 Welch Decl., ¶ 6 (Exhibit B).

18 III.

19 ARGUMENT

20 Pursuant to California Public Resources Code section 1233(b)(1), HDPP denies
21 each and every material allegation raised in the Complaint.

22 A. **Issues That Are The Subject of The Pending Proceeding.**

23 Mr. Ledford's latest round of filings includes three pleadings: i) the Complaint
24 that is the subject of this Answer; ii) a "Motion to Show Cause and Compel Compliance with
25 Conditions"; and iii) a "Request for Investigation To Determine Whether Certification Was
26 Granted Based on Applicant's Fraud; Perjured Testimony; Deceit; or Bad Faith." By Order
27 dated November 9, 2001, the Chairman of the Commission dismissed the latter two pleadings.
28 *See* Order Dismissing the Request for Investigation and Motion to Show Cause, Nov. 9, 2001

1 (Exhibit C). Thus, the only pleading before the Committee is the Complaint.

2 In an accompanying Order also issued on November 9, 2001, and a subsequent
3 Order issued on December 5, 2001, the Chairman of the Commission and the Committee,
4 respectively, limited the Commission's review of the Complaint to HDPP's compliance with
5 three discrete categories of Conditions of Certification.³ The specific allegations that are the
6 subject of the pending inquiry are as follows: i) HDPP's water treatment facilities are bigger
7 than necessary for the power plant, and additional water will be treated by those facilities for
8 non-HDPP purposes (Conditions 1e, 17(1), 19); ii) HDPP is not using the proper type of water
9 treatment facilities, and those facilities will fail to provide water "approaching background water
10 quality levels" (Conditions 12 and 13); and iii) HDPP has failed to provide to the Commission
11 various documents concerning water use and supply (Conditions 2, 11, 12, 17, 19). *See* Notice
12 of Complaint Proceeding and Order Establishing Scope of Proceeding and Setting Schedule,
13 Nov. 9, 2001, at 3 (Exhibit D); *see also* Notice of Evidentiary Hearing and Order Setting
14 Schedule for Filing Answer and Witness Lists, Dec. 5, 2001, at 3 (Exhibit E). Any allegations
15 Mr. Ledford raised in the Complaint unrelated to these three discrete issues should be ignored by
16 the Committee, and HDPP will not address these unfounded allegations.

17 **B. Appropriate Scope of Inquiry.**

18 Just as the actions of the Chairman and the Committee in limiting the issues to be
19 considered were appropriate, the scope of inquiry into the remaining issues must also be limited.
20 Most of the allegations raised by Mr. Ledford go to issues that were previously addressed by the
21 Commission during the Project approval process. There have been no material changes in the
22 design of the Project since the Commission analyzed these issues and approved the Project. The
23 complaint procedure cannot be manipulated into a mechanism for revisiting that analysis. Any
24 attempt to do so contravenes the explicit appeal procedures set forth in the Warren-Alquist Act
25 and the California Environmental Quality Act ("CEQA"), as well as the principle of res judicata.

26
27 ³ All references to "Conditions" herein refer to Soil & Water Conditions placed on the Project
28 in the Commission Decision.

1 In addition, many of the allegations are not yet ripe for review. Thus, the Committee must
2 narrowly limit the scope of inquiry into the issues it has agreed to consider.

3 1. The Commission's complaint process is not a mechanism to reopen decisions
4 made in the certification process.

5 Although styled as a complaint alleging noncompliance with the Conditions, the
6 Complaint clearly seeks to reopen inquiry into the substantive issues underlying the Conditions.
7 The Commission's complaint procedure is not a forum to revisit substantive issues previously
8 addressed during the Project review process. Only compliance with the Conditions as adopted is
9 subject to review in this proceeding.

10 As detailed above, Mr. Ledford had his day before the Commission. The
11 Commission heard his opposition, and issued its decision with the Conditions as written. To the
12 extent that Mr. Ledford was unhappy with the decision, he was free to exercise his rights of
13 appeal. Mr. Ledford did, in fact, pursue all available routes for challenging the decision on the
14 Project, including a petition for reconsideration and a petition for review to the California
15 Supreme Court. Both the Warren-Alquist Act and CEQA include very specific time periods
16 within which a challenge to a decision of the Commission must be brought. *See* Cal. Pub. Res.
17 Code §§ 25531 and 21167. We are now well outside those timeframes. Mr. Ledford seeks to re-
18 litigate those issues in circumvention of the express procedures set forth in CEQA and the
19 Warren-Alquist Act.

20 Not only is Mr. Ledford without authority to compel a re-visiting of the issues
21 addressed during the certification proceedings, the Commission is expressly prohibited from re-
22 visiting its analysis. CEQA Guidelines Section 15162(c) provides as follows:

23 Once a Project has been approved, the lead agency's role in Project
24 approval is completed, unless further discretionary approval on
25 that Project is required. Information appearing after an approval
26 does not require reopening of that approval. If after the Project is
27 approved, any of the conditions described in subsection (a) occurs
28 [substantial changes to the Project], a subsequent EIR or negative

1 declaration shall only be prepared by the public agency which
2 grants the next discretionary approval for the Project, if any.

3
4 Thus, there is no basis for the Commission to revisit its previous CEQA analysis,
5 and the scope of the inquiry is absolutely limited to HDPP's compliance with the Conditions.

6 2. Issues raised and decided are subject to *res judicata* and cannot be re-litigated in
7 this Complaint proceeding.

8 As an independent basis, issues previously raised by Mr. Ledford in the siting
9 proceedings, and his appeals of the Commission Decision, may not be re-litigated in this action
10 due to the principal of *res judicata*. *Res judicata* applies to administrative actions just as it
11 applies to judicial actions as long as (i) the issue in the present action is identical to the previous
12 action, and (ii) during the previous action the agency resolved disputed issues of fact which the
13 parties had adequate opportunity to litigate. *See, e.g., People v. Sims*, 32 Cal. 3d 468, 485
14 (1982); *Brosterhous v. State Bar of California*, 12 Cal. 4th 315, 324 (1996). In this case, Mr.
15 Ledford makes many of the same arguments he made during the Commission's siting
16 proceedings. Further, he availed himself of the opportunity to introduce evidence and cross-
17 examine witnesses. Thus, the principal of *res judicata* bars him from re-litigating these issues in
18 any forum, including this administrative complaint procedure.

19 3. Issues raised in the Complaint which are not ripe should be disregarded.

20 The Complaint contains numerous allegations that have not ripened into a genuine
21 controversy. A basic prerequisite to review of administrative decisions is the existence of a ripe
22 controversy. *See Pacific Legal Foundation v. California Coastal Comm.*, 33 Cal. 3d 158, 170
23 (1982). As articulated by the U.S. Supreme Court, "[t]he controversy must be definite and
24 concrete, touching the legal relations of parties having adverse legal interests. It must be a real
25 and substantial controversy admitting of specific relief through a decree of a conclusive
26 character, as distinguished from an opinion advising what the law would be upon a hypothetical
27 set of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937).

28 ///

1 To determine whether a case is ripe, California courts apply the following two-
2 pronged test: (1) whether the dispute is sufficiently concrete to make declaratory relief
3 appropriate; and (2) whether the withholding of judicial consideration will result in hardship to
4 the parties. *See Farm Sanctuary v. Dept. of Food and Agriculture*, 63 Cal. App. 4th 495, 502
5 (1998). Under the first prong, courts will decline to adjudicate a dispute if the abstract posture of
6 the proceeding makes it difficult to evaluate the issues, if the court is asked to speculate on the
7 resolution of hypothetical situations, or if the case presents a “contrived inquiry.” *See Id. citing*
8 *Pacific Legal Foundation*, 33 Cal. 3d at 172. Under the second prong, the courts will not
9 intervene merely to settle a difference of opinion; there must be an imminent and significant
10 hardship inherent in further delay. *Id.*

11 In the instant case, many of Ledford’s allegations involve actions or inactions that
12 HDPP or other parties must or may take in the future, but which do not require any present
13 action. The Complaint invites the Commission to speculate as to what might happen if HDPP
14 does not comply with the Conditions and the accompanying verifications at some point in the
15 future. Many of the Conditions require HDPP to take certain actions just prior to the
16 commencement of groundwater recharge activities which are not slated to begin until September
17 2002. Thus, the Commission cannot possibly determine whether HDDP is in compliance with
18 these future Conditions. Further, failure by the Commission to address these issues now will not
19 result in imminent and significant hardship to Mr. Ledford or to any other party. The Complaint
20 does not point to any evidence to indicate that HDPP will fail to comply with the Conditions and
21 verifications in the future as required. Any claims by Mr. Ledford that require analysis of what
22 HDDP may or may not do in the future must be dismissed as unripe.

23 **C. The Complainant Bears The Initial Burden Of Proof By A Preponderance Of The**
24 **Evidence.**

25 As in any lawsuit, the complaining party “has the burden of proof as to each fact
26 the existence or nonexistence of which is essential to the claim for relief . . .” Cal. Evid. Code
27 § 500. This means that the complainant, Mr. Ledford, bears the burden of persuasion to
28 “establish by evidence a requisite degree of belief concerning a fact in the mind of” the

Commission. Id. § 115. The Complainant must convince the Commission by a “preponderance of evidence” that his position is more convincing than HDPP’s position. Id. (“Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence”); *see also* People v. Herrera, 83 Cal. App. 4th 46, 61 (2000).

In addition to the burden of persuasion, the complainant also bears the initial burden of production. Cal. Evid. Code § 110. This is defined as “the obligation of a party to introduce evidence” on each issue essential to its claim. Id. The California Supreme Court recently reiterated that the party seeking relief bears the initial burden of production. Aguilar v. Atlantic Richfield Co., 25 Cal. 4th 826, 861 (2001). Thus, Mr. Ledford has the initial burden to produce evidence supporting the essential elements of his allegations, or the Commission is free to dismiss his complaint without even considering the counter-evidence offered by HDPP.

Consistent with the above standards, the Commission correctly placed the burden of proof on the Complainant in its November 9, 2001 Notice of Complaint Proceeding when it stated, “Mr. Ledford has the burden of persuading the Commission that the preponderance of the evidence supports his claims.” *See* Notice of Complaint Proceeding and Order Establishing Scope of Proceeding and Setting Schedule, Nov. 9, 2001 (Exhibit D). Respondent notes, however, that the Commission has placed the burden on producing certain documents on the Respondent in the Commission’s Notice of Pre-Hearing Conference and Order to Produce Compliance Documents, dated December 28, 2001 (“Pre-Hearing Notice”), at 2. *See* Exhibit F. Respondent will comply with the Pre-Hearing Notice to produce documents or explain why they cannot be produced, but does not understand the Pre-Hearing Notice to shift the burden of proof, which remains with the Complainant.

D. HDPP Complies With Permit Conditions Related To The Size And Use Of The Project’s Water Treatment Facilities.

1. HDPP Complies With Condition 1(e) (Size Of The Project’s Water Supply Facilities).

Mr. Ledford alleges that HDPP has violated Condition 1(e) by “oversizing” the Project’s water supply facilities. Condition 1(e) requires that “the Project’s water supply

1 facilities shall be appropriately sized to meet Project needs.” Mr. Ledford made this exact same
2 allegation during the Commission proceedings. *See* Feb. 18, 2000 Hearing Transcript, at 221,
3 226 (Exhibit G); *see also* Declaration of Gary A. Ledford, Oct. 11, 2001 ¶ 3 (Exhibit H). The
4 Commission ultimately disagreed with his assertion that the design specifications for the
5 Project’s water supply facilities were oversized. As stated in the Commission Decision at
6 page 227, “The evidence simply does not support Mr. Ledford’s conjecture. Direct,
7 uncontradicted testimony establishes that the design capacity of Project pipelines is required to
8 meet Project needs. These needs include peak, not just average, water flows in order to transport
9 water both for cooling as well as injection for storage.” Commission Decision, at 227 (citations
10 omitted). Nothing in the Project design relevant to facility sizing has changed since Mr. Ledford
11 initially made this allegation and the Commission rejected it.

12 During the Commission proceedings, HDPP informed the Commission that it
13 expected to construct water supply piping of 24 inches in order to meet peak flow. *See* Feb. 18,
14 2000 Hearing Transcript, at 117:22-25 (“Q: And what capacity would a 24-inch pipe provide?
15 A: That was – the design criteria was to meet the maximum peak flow into the Project . . .”)
16 (Exhibit I). The Commission received further testimony that “the pipe sizes were developed by
17 our engineers under specific instructions to meet only our need, and these are the numbers I got
18 back for the pipe sizes.” *Id.* at 127:19-21 (Exhibit J). The design plan for the piping remains the
19 same – a 24-inch pipe designed to meet peak flow for the Project’s needs only. Nothing related
20 to design parameters of the Project’s piping size has changed since the Commission received this
21 testimony. *See* Welch Decl., ¶ 3 (Exhibit B). Mr. Ledford has not presented any evidence to the
22 contrary.

23 In fact, Mr. Ledford’s Complaint does not contend that HDPP is doing anything
24 other than what is required under Condition 1(e), and what was contemplated during the
25 Commission proceedings. Mr. Ledford simply alleges in his Complaint that “the Commission
26 ignored Mr. Ledford’s testimony in favor of evidence presented by HDPP.” Complaint, at 4:6-7.
27 That is exactly the point – Mr. Ledford raised his (unfounded) contention that the Project’s water
28 supply facilities are oversized for the Project’s needs, and the Commission rejected that

1 argument. Now, Mr. Ledford in essence asks the Commission to revisit its decision regarding
2 the appropriate size of the water supply facilities. The Commission cannot do so in the context
3 of this Complaint procedure which is intended to simply assess whether HDPP is complying with
4 the extant Conditions. Furthermore, even if the Commission were in a position to revisit the
5 analysis, Mr. Ledford has not presented any evidence to suggest that the outcome of the inquiry
6 would be any different. The only evidence is that HDPP is indeed complying with Condition
7 1(e), and that the Project's water supply facilities are appropriately sized.

8 The verification for Condition 1(e) requires that HDPP provide final design
9 drawings of the Project's water supply facilities to the Compliance Project Manager ("CPM"),
10 for review and approval, thirty days prior to commencing Project construction. Project
11 construction commenced on May 17, 2001, as authorized by Commission staff. *See* Welch Decl.
12 ¶ 2 (Exhibit B); *see also* Letter from S. Munro to N. Parece, May 17, 2001 (Exhibit K). Final
13 design drawings for the Project's water supply facilities were submitted to the CPM on March
14 27, 2001,⁴ which was more than 30-days prior to the commencement of Project construction.
15 *See* Welch Decl., ¶ 2 (Exhibit B); *see also* Final Design Drawings submitted to Compliance
16 Project Manager, Mar. 27, 2001, *and* Letter from D. Lumma to S. Pearson, Mar. 26, 2001
17 (Exhibit L). The March 26, 2001 cover letter describing the design drawings indicates that the
18 project facility will be built with pipes of 24-inch diameter or less. *Id.*

19 2. HDPP Is In Compliance With Condition 17(1) (Aquifer Storage and Recovery
20 Agreement).

21 Mr. Ledford alleges that HDPP is not complying with Condition 17(1) which calls
22 for the execution of an Aquifer Storage and Recovery Agreement between HDPP and the Victor
23 Valley Water District ("VVWD") containing certain provisions. There is simply no basis for this
24 allegation. HDPP and VVWD have in fact entered into such an agreement. *See* Aquifer Storage

25 ///

26 _____
27 ⁴ This submission indicates that Reverse Osmosis would be the treatment method utilized. The
28 treatment method was subsequently changed to ultra-filtration based on the advice of VVWD
that ultra-filtration is its preferred treatment methodology. *See* Welch Decl. ¶ 2.

1 and Recovery Agreement For The High Desert Power Project, Jan. 18, 2000 (the "ASRA")
2 (Exhibit M).

3 Condition 17(1) also requires that the ASRA prohibit VVWD from producing or
4 allowing others to produce water from Project wells, except under two circumstances. One, the
5 wells may be used to supply water to the Project itself. The ASRA so provides. *See* ASRA,
6 ¶ 11. Two, the wells may be used for other purposes, provided that the amount of such use does
7 not exceed a "baseline" amount as defined in Condition 17(1). As required by the Condition, the
8 ASRA contains such restrictions on VVWD's use of the wells. *See* ASRA, ¶ 15.1 (VVWD's use
9 of the wells is allowed "provided that such use is consistent with the requirements of the
10 California Energy Commission conditions of certification Soils and Water 7, 17 and 18. . .").
11 The ASRA actually attaches Condition 17 and incorporates the Condition into the ASRA itself.
12 Id.

13 Commission staff has previously pointed out that the Conditions attached to the
14 ASRA differ in certain respects from the final Conditions adopted by the Commission. This is
15 not surprising because, as pointed out in Section 41 of the ASRA, the execution of the ASRA
16 was a precondition to the Commission's certification of the Project. The conditions attached to
17 the ASRA are as they existed at the time the ASRA was entered into. In recognition of the fact
18 that they could be modified prior to final Commission certification, the conditions were
19 identified as "Pending Revision," and either party was allowed to terminate the ASRA within 60
20 days of receipt of the final Conditions. Neither party terminated the ASRA, and it is now subject
21 to the final Conditions. This issue is addressed in an October 4, 2001 letter from HDPP to the
22 Commission (Exhibit N) and an October 16, 2001 letter from the VVWD to the Commission
23 (Exhibit O), in which both parties acknowledge that the ASRA is governed by the final
24 Conditions and acknowledge their intent to be bound by the final Conditions. Thus, HDPP has
25 expressly and completely complied with Condition 17(1) requiring HDPP to enter into the
26 ASRA, and to ensure that the ASRA is consistent with the Conditions as they relate to use of the
27 Project wells. Mr. Ledford's contention is without any factual basis.

28 ///

1 The verification to Condition 17 requires that HDPP provide a copy of the signed
2 ASRA to the CPM and the California Department of Fish & Game prior to commencing
3 construction of the Project. As discussed above, execution of the ASRA was a precondition to
4 the Commission's certification of the Project. The ASRA was docketed by HDPP on February
5 10, 2000. It was sponsored by HDPP as Exhibit 145, and admitted into evidence on February 18,
6 2000. This was well in advance of commencement of construction, which occurred on May 17,
7 2001.

8 3. HDPP Is In Compliance With Condition 19 (Limitation on VVWD's Use of
9 Treatment Facilities).

10 Condition 19 requires HDPP to limit VVWD's use of the treatment facilities to
11 providing water to HDPP or treating State Water Project ("SWP") water for injection into the
12 regional aquifer. The Condition also prohibits the use of the water treatment facilities for
13 injection and subsequent recovery by VVWD unless the Watermaster and VVWD have entered
14 into a water storage agreement for such use, and completed a CEQA review for such use.
15 Finally, the Condition prohibits any use of the water treatment facilities for domestic purposes
16 without an amendment to the Commission Decision. There is no evidence that HDPP has failed
17 in any way to comply with this Condition.

18 The Condition involves VVWD's *use* of the treatment facilities. Compliance with
19 this Condition is not ripe for review as the treatment facilities have not even been built yet. *See*
20 *Welch Decl.* ¶ 4 (Exhibit B). There can be no serious argument that HDPP or VVWD has
21 violated Condition 19 by improperly using the non-existent treatment facilities. The allegations
22 of violation of Condition 19 must be dismissed for lack of ripeness. Nor has Complainant
23 presented any evidence to suggest that HDPP does not intend to comply with Condition 19. In
24 fact, available evidence (i.e., the ASRA (Exhibit M) and correspondence (Exhibits N and O))
25 clearly indicates that HDPP intends to comply fully with Condition 19 as it applies to the
26 treatment facilities.

27 The verification for Condition 19 requires that the limitations set forth in the
28 Condition be included in any water storage agreement between the Watermaster and VVWD,

1 and that any such agreement be provided to the CPM within thirty days of its execution. The
2 Watermaster and VVWD have not yet executed the subject water storage agreement, so the
3 obligation to provide a copy to the CPM has not yet been triggered, and any failure to do so is
4 not ripe for review. It is anticipated that VVWD and the Watermaster will execute an agreement
5 consistent with the Conditions in the first quarter of 2002. See Welch Decl., ¶ 7.

6 Furthermore, as described above, the ASRA, which is binding on HDPP and
7 VVWD, incorporates all of the final Conditions, including Condition 19. Thus, the ASRA,
8 which has been executed and made a part of the evidentiary record, acts as an independent
9 verification of Condition 19. Contrary to Mr. Ledford's suggestion that HDPP has violated
10 Condition 19, the truth of the matter is that HDPP and VVWD have, through the ASRA,
11 demonstrated their intention to comply with Condition 19 well in advance of the obligation
12 becoming ripe.

13 **E. HDPP Complies With Conditions Related To The Project's Treatment Of Water.**

14 1. HDPP Is In Compliance With Condition 12 (Treatment Of Banked Water).

15 Condition 12 requires HDPP to submit to the Commission and, if applicable, to
16 the Regional Water Quality Control Board, Lahontan Region ("RWQCB") a water treatment and
17 monitoring plan that specifies the type and characteristics of the treatment processes and
18 identifies any waste streams and their disposal methods. Condition 12 further requires that the
19 treatment of water prior to injection be "to levels approaching background water quality levels of
20 the receiving aquifer or shall meet drinking water standards, whichever is more protective." Mr.
21 Ledford alleges that HDPP is not using the proper type of water treatment facilities, and that the
22 proposed treatment will not result in water approaching background water quality levels.

23 As a preliminary matter, HDPP acknowledges that the Committee's December 5,
24 2001 Order indicates that the Committee intends to review compliance with Condition 12
25 notwithstanding that such review may not be ripe. HDPP notes for the record, however, that the
26 verification for Condition 12 does not require submittal of the treatment plan until ninety days
27 prior to banking of SWP water. Banking is not expected to occur until September 2002, making
28 Condition 12 ripe sometime in June 2002. Nevertheless, HDPP has submitted to the RWQCB

1 and the Commission the Report of Waste Discharge and Antidegradation Analysis which will
2 form the basis of compliance with Condition 12. *See* Report of Waste Discharge and
3 Antidegradation Analysis for the Proposed High Desert Power Project Groundwater Banking
4 Operation, May 2001 (Exhibit P); *see also* Supplemental Reports of Waste Discharge, June 20,
5 2001, June 29, 2001 and July 30, 2001, and Supplemental Antidegradation Analysis (Exhibits Q,
6 R, S and U); *see also* Welch Decl. ¶ 5 (Exhibit B). In order to keep the Commission informed as
7 to HDPP's proposed treatment system, HDPP provided the Commission with this same
8 information. *See* Letter from S. Pearson to S. Munro, June 21, 2001 (Exhibit W).

9 With respect to the issue of whether HDPP will use the "proper" type of
10 treatment, Mr. Ledford contends that Condition 12 requires reverse osmosis as the method to
11 treat SWP water prior to injection. This is simply not the case. There is no mention of reverse
12 osmosis in the language of Condition 12, or anywhere else in the Commission Decision.
13 Furthermore, nowhere in the record is there any indication that reverse osmosis was a
14 requirement of the Commission. As recently noted by the Executive Director of the Energy
15 Commission:

16 "During the Commission's HDPP public review process, there was a
17 thorough discussion and consideration of methods of treatment of SWP water
18 prior to injection into the underground aquifer. One of the methods discussed
19 during the review process was the application of reverse osmosis on a portion of
20 the SWP water treatment stream prior to injection. Because there were a number
21 of alternative water treatments available, *no specific method of water treatment*
22 *was ultimately specified in the HDPP Commission Decision.*"

23 *See* Letter from S. Larson to H. Singer, Sept. 10, 2001 (Exhibit A) (emphasis added).

24 Finally, implicit in the Condition itself is that the exact treatment method was
25 unspecified at the time the Condition was adopted as the Condition does not call for the
26 implementation of a specific design, but for the submission of a plan to the Commission and the
27 RWQCB. The Condition was written is a goal-oriented Condition, rather than a design-oriented
28 Condition. Simply put, the Commission left it up to HDPP to propose a treatment system to the

1 RWQCB that would result in certain water quality results, namely, levels approaching
2 background or meeting drinking water standards, whichever was more protective. Had the
3 Commission expected that a particular design system was required (such as reverse osmosis), it
4 could have inserted that language in the Condition. It did not do so; instead, it envisioned that
5 HDPP would develop a treatment plan in order to reach certain water quality results. That is
6 exactly what occurred here.

7 With respect to the “approaching standard,” Complainant alleges that the
8 Conditions require that injected water be treated to a level that “meets or exceeds background
9 water quality levels.” *See* Complaint ¶ 13. Once again, Mr. Ledford’s allegation is contrary to
10 the express language of the Conditions. Condition 12 states that treatment shall be to levels
11 “approaching background water quality levels.” By definition, “approaching” falls short of
12 “meeting” and certainly short of “exceeding.”⁵ Had the Commission intended the standard to be
13 “meet or exceed,” it would have stated so. It did not.

14 The term “approaching” is not precisely defined in the Commission Decision, or
15 elsewhere in the evidentiary record. Implicit in Complainant’s allegations is a desire that the
16 Project be bound by a more precise standard (i.e., background water quality levels). All parties
17 had the opportunity to express their views on the Condition during the certification process and
18 the post-approval appeal process. The specific language of Condition 12 was, in fact, proposed
19 by Commission’s staff. The Commission elected to impose the less precise “approaching”
20 standard rather than a more precise standard, such as background levels. HDPP has relied upon
21 the specific language of Condition 12 in developing its water treatment plan. The Committee
22 cannot now substantively modify Conditions to the detriment of a developer who has relied in
23 good faith on the Conditions as approved.

24 Finally, water treated by the proposed treatment plan will, in fact, result in water
25

26 ⁵ HDPP acknowledges that Condition 13 states that water shall be treated to “meet” local
27 groundwater conditions. However, this same sentence includes the phrase “as identified in
28 Condition Soil & Water – 12.” Condition 13 thus looks to Condition 12, which explicitly
sets forth the treatment standard.

1 that approaches background levels in the aquifer and meets drinking water standards. *See Report*
2 *of Waste Discharge and Antidegradation Analysis*, Bookman and Edmonston, May 2001
3 (Exhibit P). According to HDPP's Report of Waste Discharge ("RWD"), treated water will
4 result in Total Dissolved Solids ("TDS") levels approximately 83 mg/l above background in the
5 first six years of plant operations and only 20 mg/l after that. *Id.* at Table 8, section 7. This
6 effect will be localized in the aquifer near the injection point. TDS levels as measured at the
7 closest drinking water well will show increased TDS levels of only 2 mg/l, an insignificant
8 effect. *Id.* at 7-5. Water post-treatment is estimated to consist of TDS levels averaging 248
9 mg/l, well below the State's secondary drinking water standard of 500 mg/l. *Id.* at 7-2. Notably,
10 the post-treatment water will consist of lower than background levels of most metals, including
11 arsenic and chromium. *Id.* at ES-3.

12 It should also be noted that these levels of TDS pose no human health threat. The
13 drinking water standard of 500 mg/l is a secondary Maximum Contaminant Level ("Secondary
14 MCL"). Secondary MCLs are not promulgated based on risk to human health or the
15 environment, but, rather, are based on aesthetic concerns such as taste and odor. Nevertheless,
16 HDPP will treat the SWP water to a level *50% below* the Secondary MCL for TDS, which will
17 be fully protective of human health, the environment and aesthetics.

18 As stated by the RWQCB staff, "the water quality changes on local ground waters
19 are not significant." *See* draft Conditional Waiver of Waste Discharge Requirements, at 5
20 (Exhibit T). The Executive Director of the Energy Commission also concurs that "HDPP's
21 proposed treatment system . . . meets the requirements of the HDPP Soil and Water Resources
22 Conditions of Certification." *See* Letter from S. Larson to H. Singer, Sept. 10, 2001 (Exhibit A).
23 HDPP expects the RWQCB to approve the proposed treatment plan in the near future, possibly at
24 its February 2002 meeting.

25 For all the reasons stated above, HDPP is in compliance with Condition 12. Mr.
26 Ledford's contention that the specific type of treatment (namely, reverse osmosis) should
27 somehow be read into the Condition is not supported by the record. HDPP's treatment plan will
28 result in water that approaches background levels in the aquifer and meets all drinking water

standards.

2. HDPP Is In Compliance With Condition 13 (Implementation of Water Treatment and Monitoring Plan).

Condition 13 calls for the implementation of the treatment plan as approved in Condition 12. HDPP's compliance with this Condition is not ripe for review at this time as Condition 13 does not call for any action to be taken until *after* the banking program has commenced. As the water treatment facilities have not been constructed, and groundwater recharge has therefore not commenced, HDPP cannot possibly have violated this reporting Condition. The merits of Condition 13, which the Committee has decided to address notwithstanding the fact that the claim of violation is not yet ripe, are addressed above in response to the alleged violation of Condition 12.

F. HDPP Complies With Conditions Requiring HDPP To Supply The Commission With Various Documents.

1. HDPP Is In Compliance With Condition 2 (Storage Agreement between Mojave Water Agency and VVWD).

Condition 2 requires HDPP to submit a copy of the Water Storage Agreement, once executed, between the Watermaster and VVWD prior to commencing groundwater banking. Compliance with Condition 2 is not ripe as VVWD has not initiated any groundwater banking as of this date, and does not contemplate initiating groundwater banking until September 2002. As Condition 2 does not require HDPP to have taken any action as of this date, under no circumstances can HDPP be out of compliance with this Condition.

The verification for Condition 2 calls for HDPP to provide the CPM with VVWD's application to the Watermaster for a storage agreement at the time the application is filed. This part of the verification is not ripe for review as no application has been made by VVWD. Furthermore, it is HDPP's understanding that the process of entering into the water storage agreement does not include an application. If an application is submitted, it will be provided to the CPM at such time as it is made. The second part of the verification calls for the submission of the storage agreement between the Watermaster and VVWD once it is executed.

1 Again, this obligation is not yet ripe for review as the storage agreement has not been finalized.
2 It is anticipated that VVWD and the Watermaster will execute the agreement in the first quarter
3 of 2002. *See* Welch Decl., ¶ 7. Once the storage agreement is finalized, it will be submitted to
4 the CPM as Condition 2 requires.

5 2. HDPP Is In Compliance With Condition 11 (RWQCB's Waiver Of WDR).

6 Condition 11 requires HDPP to submit an approved Waste Discharge
7 Requirement ("WDR") prior to the start of groundwater banking, unless the RWQCB decides to
8 waive the need to issue a waste discharge requirement or waive the need for the Project owner to
9 file a Report of Waste Discharge. HDPP cannot possibly be in violation of this Condition. First,
10 as described above, groundwater banking has not commenced and is not expected to commence
11 until September 2002. Since the trigger date for this obligation is "prior to the start of any
12 groundwater banking," there is no basis to claim that HDPP has not complied with this
13 Condition. The issue simply is not ripe. Second, the Condition expressly eliminates the
14 obligation to submit the approved waste discharge requirement in the event that the RWQCB
15 decides to waive the need to issue a waste discharge requirement. This, in fact, is what the
16 RWQCB staff has proposed to do.

17 HDPP submitted to the RWQCB a Report of Waste Discharge in May 2001. *See*
18 *Report of Waste Discharge and Antidegradation Analysis* (Exhibit P). The Report of Waste
19 Discharge was supplemented with additional information on June 20, 2001, June 29, 2001 and
20 July 30, 2001, as well as a supplement to the Antidegradation Analysis submitted on August 23,
21 2001. *See* Exhibits Q, R, S and U. Based on this information, the RWQCB Staff has prepared a
22 draft Conditional Waiver of WDR for the RWQCB's consideration. *See* draft Conditional
23 Waiver of WDR, Nov. 9, 2001 (Exhibit T). As a responsible agency under CEQA, the RWQCB
24 is relying on the Commission's CEQA review of the Project to support its proposed issuance of
25 the Conditional Waiver of WDR. In addition, the RWQCB staff also prepared a draft CEQA
26 Addendum addressing any potential environmental impacts of the groundwater banking. *See*
27 Draft CEQA Addendum, Oct. 23, 2001 (Exhibit V). RWQCB Staff determined in the draft
28 CEQA Addendum that "HDPP's potential impacts to groundwater are insignificant." *Id.* at 9.

1 The Executive Director of the Energy Commission, Steve Larson, supported the
2 RWQCB staff's assessment that the Project will not have a significant effect on the environment
3 and urged the RWQCB to adopt a waiver of WDR. *See* Letter from S. Larson to H. Singer, Sept.
4 10, 2001 (Exhibit A). The Regional Board is expected to rule on this draft Conditional Waiver
5 of WDR shortly, possibly at its February 2002 meeting. At such time as the draft Conditional
6 Waiver of WDR is approved by the RWQCB, it will be submitted to the Commission as required
7 by Condition 11.

8 There is a tension between Condition 11 and the corresponding verification
9 regarding submittal of an approved WDR. Whereas the language of the Condition specifies that
10 the document be submitted to the Commission prior to groundwater banking, the verification
11 contemplates that it will be submitted within 60 days of the start of rough grading. While any
12 discrepancy between the language of the Condition and the verification should be resolved in
13 favor of the Condition itself, there is no need to resolve the discrepancy since the RWQCB is not
14 planning to issue Waste Discharge Requirements. Therefore, the precise time at which an
15 approved Waste Discharge Requirement must be submitted is rendered moot. The verification
16 also states that if a waiver of Waster Discharge Requirements is obtained, as is anticipated, it
17 must be submitted to the CPM, but the verification does not specify when it must be submitted.
18 As stated above, HDPP will submit the waiver of Waste Discharge Requirements when it is
19 obtained.

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IV.

CONCLUSION

HDPP is in full compliance with the letter and spirit of the Soil and Water Conditions at issue. Mr. Ledford's allegations are primarily a reiteration of his opposition to the Project, not a serious claim that HDPP is out of compliance with the Conditions as adopted by the Commission. Mr. Ledford's claims of noncompliance are not supported by any evidence. HDPP respectfully requests that the Committee adopt a recommendation to the Commission recognizing HDPP's Compliance with the Soil and Water Certification Conditions Numbers 1.e, 2, 11, 12, 13, 17 and 19 and that Mr. Ledford's Complaint be dismissed with prejudice.

Dated: January 7, 2002

LATHAM & WATKINS

By 
Michael J. Carroll
Attorneys for Respondent
High Desert Power Project, LLC

VERIFICATION

I, Thomas M. Barnett, declare as follows:

1. I am an officer of the High Desert Power Project, LLC.
2. I have read the foregoing Answer to Complaint and know its contents.

The facts alleged in the Answer are within my personal knowledge and I know these facts to be true.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this verification was executed on January 7, 2002, at Newport Beach.


Thomas M. Barnett

INDEX OF EXHIBITS (filed separately)

Exhibit

Description

- A Letter to from Steve Larson, Executive Director of California Energy Commission, to Harold Singer, Executive Officer of the California Regional Water Quality Control Board, Lahonton Region, dated Sept. 10, 2001
- B Declaration of Andrew Welch, dated January 7, 2002
- C California Energy Commission, Order Dismissing The Request for Investigation and Motion to Show Cause, dated Nov. 9, 2001
- D California Energy Commission, Notice of Complaint Proceeding and Order Establishing Scope of Proceeding and Setting Schedule, dated Nov. 9, 2001
- E California Energy Commission, Notice of Evidentiary Hearing and Order Setting Schedule for Filing Answer and Witness Lists, dated Dec. 5, 2001
- F California Energy Commission, Notice of Pre-Hearing Conference and Order to Produce Compliance Documents, dated Dec. 28, 2001
- G Hearing Transcript before the California Energy Commission, dated Feb. 18, 2000, pages 221, 226
- H Declaration of Gary A. Ledford, dated Oct. 11, 2001
- I Hearing Transcript before the California Energy Commission, dated Feb. 18, 2000, page 117
- J Hearing Transcript before the California Energy Commission, dated Feb. 18, 2000, page 127
- K Letter from Steve Munro, California Energy Commission, to Neal Parece, High Desert Power Project, dated May 17, 2001
- L Final Design Drawings submitted to Compliance Project Manager, Mar. 27, 2001
- M Aquifer Storage and Recovery Agreement For The High Desert Power Project, dated Jan. 18, 2000

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Exhibit

Description

- N Letter from Thomas Barnett, High Desert Power Project, to Steve Munro, California Energy Commission, dated Oct. 4, 2001
- O Letter from the Randy Hill, Victor Valley Water District to Steve Munro, California Energy Commission, dated Oct. 16, 2001
- P Report of Waste Discharge and Antidegradation Analysis for the Proposed High Desert Power Project Groundwater Banking Operation, Bookman and Edmonston, dated May 2001.
- Q Supplemental Report of Waste Discharge, Bookman and Edmonston, dated June 20, 2001
- R Supplemental Report of Waste Discharge, Bookman and Edmonston, dated June 29, 2001
- S Supplemental Report of Waste Discharge, Bookman and Edmonston, dated July 30, 2001
- T Draft Conditional Waiver of Waste Discharge Requirements, California Regional Water Quality Control Board, Lahontan Region, dated Nov. 9, 2001
- U Supplemental Antidegradation Analysis, Best, Best & Krieger, LLP, dated Aug. 23, 2001
- V Draft CEQA Addendum, California Regional Water Quality Control Board, Lahontan Region, dated Oct. 23, 2001
- W Letter from Shirley Pearson to Steve Munro, dated June 21, 2001

STATE OF CALIFORNIA
Energy Resources
Conservation and Development Commission

In the Matter of:)	Docket No. 97-AFC-1C (C1)
)	
COMPLAINT OF GARY LEDFORD ON)	PROOF OF SERVICE
HIGH DESERT POWER PROJECT)	[Revised 12/28/01]
WATER ISSUES)	
)	
)	

I, Paul Kihm, declare that on January 7, 2002, I distributed copies of the attached:

ANSWER TO COMPLAINT

☒ via electronic transfer (e-mail) and by depositing copies with FedEx overnight mail delivery service at Costa Mesa, California with delivery fees thereon fully prepaid and addressed to the following:

DOCKET UNIT

CALIFORNIA ENERGY COMMISSION
DOCKET UNIT, MS-4
Attn: Docket No. 97-AFC-1C (C1)
1516 Ninth Street, MS-4
Sacramento, California 95814-5512
Email: docket@energy.state.ca.us

☒ via electronic transfer (e-mail) and by depositing copies with FedEx overnight mail delivery service at Costa Mesa, California with delivery fees thereon fully prepaid and addressed to the following:

COMPLAINANT

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The Jess Ranch
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jessranch@attglobal.net

HIGH DESERT POWER PROJECT
CEC Docket No. 97-AFC-1C (C1)

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HIGH DESERT POWER PROJECT
CEC Docket No. 97-AFC-1C (C1)

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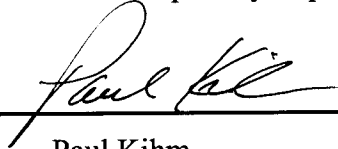
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Region 6, Environmental Services
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HIGH DESERT POWER PROJECT
CEC Docket No. 97-AFC-1C (C1)

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I declare under penalty of perjury that the foregoing is true and correct.



Paul Kihm